ing that the demurrant admits all of the demurree's evidence, whether material to his right of action or mere matter of aggravation, is that in these jurisdictions the practice of demurring to the evidence is looked upon with disfavor, even where it has not fallen altogether into disuse.[19] Further, the right to demur is not *stricti juris;*[20] and it is discretionary with the court whether it shall compel a joinder.[21] By the operation of these principles, it might be permissible to compel the demurrant to make the admissions in question before being allowed to demur, if such action should be deemed to be in accordance with the general policy of the law in those jurisdictions. But this would scarcely be the case in Virginia, for here the demurrer to evidence is frequently resorted to, and is perhaps more favorably regarded than in any other jurisdiction except West Virginia.[22] And furthermore, in Virginia, whenever the demurrant has a right to demur, the courts compel a joinder in the demurrer,[23] provided the grounds of demurrer are specifically set forth in writing.[24]

To sum up, it appears that probably in all jurisdictions (except Tennessee), in which the practice of demurring to the evidence exists, and almost certainly in Virginia, the party demurring should not be held to have admitted the evidence of his opponent that relates merely to the quantum of damages.

REGISTRY OF SUBSEQUENT ENCUMBRANCE AS NOTICE TO PRIOR MORTGAGEE IN MORTGAGE TO SECURE FUTURE ADVANCES.—A mortgage is a valid encumbrance, not only as security for money advanced at the time of execution, but also for advances to be made in future.[1] The prior mortgage, duly recorded, is superior to subsequent liens or encumbrances, when the advances sought to be secured are made *without notice* of the subsequent encumbrances. This is equally true, whether the making of further ad-

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[19] The practice of the different States is reviewed in Hopkins *v.* Nashville, etc., R. Co., *supra*, where it is said that the practice of demurring to the evidence now exists in seventeen of the States.

[20] Jones *v.* Ireland, 4 Iowa 63. See also Trout *v.* Virginia, etc., R. Co., *supra.*

[21] Morrison *v.* McKinnon, 12 Fla. 552. See also Brandon *v.* Huntsville Bank, 1 Stew. (Ala.) 320, 18 Am. Dec. 48.

[22] As is evidenced by the fact before noticed that only in these jurisdictions is the demurrant's evidence considered in passing upon his demurrer. Bowers *v.* Bristol Gas Co., *supra.*

[23] Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238; Eubanks *v.* Smith, 77 Va. 206. A party has a right to enter such a demurrer, except where the evidence being clearly against him, his motive is to delay the decision, or where the court doubts what facts should be reasonably inferred from the evidence demurred to. Citations, *supra.* Also, University *v.* Snyder, *supra.*

[24] Va. Code, 1919, § 6117.

[1] Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270; Alexandria Savings Inst. *v.* Thomas, 29 Gratt. (Va.) 483.

vances is *optional* with the mortgagee or *obligatory* upon him under his contract.[2]

But where the advances secured are made *with notice* of the subsequent encumbrances, the question as to whether the mortgagee is bound to make the advances or may do so at his option becomes important. When the mortgagee has *actual* notice of the later encumbrances, the cases are generally in accord. If he is bound to make the advances and has no option in the matter, his mortgage takes precedence over subsequent liens or encumbrances, even though the advances are made with actual notice of the subsequent liens.[3] Where the advances are optional, however, the question is slightly more complicated. The great weight of authority holds that in such cases the mortgagee, after actual notice of subsequent liens, makes further advances at his own risk, the subsequent liens taking priority over his mortgage.[4]

Since actual notice of subsequent liens is not sufficient to cause a prior mortgage for future advances to be postponed to such subsequent liens where the mortgagee is bound to make the advances, much less is such prior mortgage affected by *constructive* notice, as by recordation of the subsequent encumbrances. The great conflict of authority arises, however, in cases where the advances are optional with the mortgagee and the subsequent liens or encumbrances are duly recorded. The question then is whether recordation is such notice to the mortgagee as will have the effect of causing all further advances to be made at his peril.

It is often stated as a general rule that the recordation of a second mortgage is not constructive notice to the prior mortgagee.[5] In *Birnie* v. *Main,*[6] it was said that the recordation of a subsequent mortgage is not retrospective, and that a mortgagee, once having had his mortgage recorded, need not search the records later to see if other encumbrances have been placed on the land. In Illinois, it is held that a mortgagee need not take notice

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[2] Alexandria Savings Inst. *v.* Thomas, *supra.*

[3] Boswell *v.* Goodwin, 31 Conn. 74, 81 Am. Dec. 169; Ladue *v.* Detroit, etc., R. Co., 13 Mich. 380, 87 Am. Dec. 759; Hyman *v.* Hauff, 138 N. Y. 48, 33 N. E. 735; Tompkins *v.* Little Rock, etc., R. Co., 15 Fed. 6. In the case last cited, the court said: "Whenever the mortgagee is bound to make the advances * * * the mortgage creates a binding contract between the mortgagor and the mortgagee, and a valid lien, *as of its date,* for all advances which are made in conformity to its provisions; and subsequent mortgagees, and those claiming under them, are bound to regard such a mortgage as a valid lien for the utmost amount that the mortgagor has a right to demand shall be advanced to him under it." (Italics supplied.)

[4] Tapia *v.* Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288; Central Trust Co. *v.* Continental Iron Works, 51 N. J. Eq. 605, 28 Atl. 595, 40 Am. St. Rep. 539; McDaniels *v.* Colvin, 16 Vt. 300, 42 Am. Dec. 512.

[5] Birnie *v.* Main, 29 Ark. 591; Iglehart *v.* Crane, 42 Ill. 261; Deuster *v.* McCamus, 14 Wis. 307; McDaniels *v.* Colvin, *supra;* Clarke *v.* Cowan, 206 Mass. 252, 92 N. E. 474.

[6] *Supra.*

of deeds recorded subsequent to his own mortgage, for he is neither a "creditor" nor a "subsequent purchaser," and therefore registry is not notice to him.[7] On an examination of these cases, however, it will be found that the mortgages in question were such that the rights under them were vested at the time of their execution.

The question as to when rights become vested under a mortgage to secure future advances is of importance. If they vest upon the execution of the mortgage, then the case of future advances falls under the general rule as given above. If, on the other hand, they vest only at the time the advances are made, should not the prior mortgagee be considered a "subsequent purchaser" as to other liens duly recorded before the making of the advances?

In *Tapia* v. *Demartini*,[8] the court regarded a mortgage of this sort as constituting from the time of its execution a lien for the whole sum to be advanced, and not a lien for each separate amount advanced existing from the time of advancement.[9] Although the right to enforce the collection thereof can arise only upon the making of each advance, it is held that since the lien has already attached, the recordation of subsequent encumbrances does not affect the first mortgagee.

The doctrine that the lien attaches at the time of the execution of the mortgage is upheld on several grounds. Equity cherishes as one of its great maxims that "What has been agreed to be done shall, for the advancement of justice, be regarded as done."[10] The mortgage in *Central Trust Co.* v. *Continental Iron Works*[11] was given to secure advances to be made for the purposes of the mortgagor, and the court correctly held that the intention of the parties could be carried out only by treating the transaction as a whole as of the date of the mortgage, thus applying the equitable maxim. The advances were *to be made* and so were considered as *made*, thus causing the lien to attach at once. Other courts have held likewise that where a mortgage was given to secure optional advances, recordation of subsequent liens is not sufficient notice to the senior mortgagee, but that actual notice is required.[12]

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[7] Iglehart *v.* Crane, *supra;* and see excellent note in Ann. Cas. 1913C, 555.

[8] *Supra.*

[9] See also Ackerman *v.* Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621; Shirras *v.* Caig, 7 Cranch 34.

[10] Central Trust Co. *v.* Continental Iron Works, *supra.*

[11] *Supra.*

[12] Union National Bank *v.* Milburn & Stoddard Co., 7 N. D. 201, 73 N. W. 527; Hall *v.* Williamson Grocery Co., 69 W. Va. 671, 72 S. E. 780; McDaniels *v.* Colvin, *supra.* In the last of these cases, the court said: "The correct view of this subject is this, that creditors, purchasers, or mortgagees, may prevent further advances, when they become interested, by giving notice to the first mortgagee of their interest, and an intimation, at least, that no further advances are to be made on the security of the mortgage as against them. Something more than a mere knowledge in the mortgagee of such subsequent interest of the creditor, etc., is necessary. Notice must be

It would be very unjust, these courts contend further, for a man who has already secured himself by a mortgage to lose his security by the mere registration of a subsequent lien—that is, by no act of his own. To force the senior mortgagee to search the records daily would be a great burden on him, and these courts see no reason in law or equity for forcing him to do this, holding as they do that mortgages can continue *in esse,* though the sum to be secured is indefinite. In *Union National Bank* v. *Milburn & Stoddard Co.,*[13] the court, in a very strong opinion delivered by Chief Justice Corliss, held that on principle recordation was not sufficient notice.[14]

Inconvenience is often raised as an objection to the doctrine requiring actual notice. It is contended that if the first mortgagee lived at a great distance, it would be a hardship to require the second mortgagee to give him actual notice. But, in such a case, it would be equally difficult for the mortgagor to obtain advances, and little danger would arise from the requirement of actual notice.[15]

Opposed to those States that deem actual notice necessary are a considerable number of courts.[16] While the former view seems to be the better, the reasoning upon which the latter courts base their decisions likewise appears to be sound. According to it, a mortgage is a security for the payment of money. If no money is due when the mortgage is executed, there can be nothing to secure, and consequently the lien can not attach until such time as an advance is made.[17] A mortgage is held by these courts to be a strictly legal document, and hence one to secure future advances can not be held in abeyance until the advances are made.[18] Not until then does it become effectual as an encumbrance, and therefore a second lien duly recorded takes priority over later advances under the first mortgage.[19] There need be no binding ob-

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given to him to prevent any further dealings between him and the mortgagor on the security. By the recording a second mortgage, attachment, execution, or deed, no such notice is to be inferred; nor is the record constructive notice to the first mortgagee of such subquent interest in others."

[13] *Supra.*

[14] The Chief Justice, in speaking of the doctrine of recordation as sufficient notice, said: "While there is much force in the arguments adduced in support of this doctrine, we regard the opposite rule as more consistent with principle, and more just in character, and better calculated to subserve business convenience."

[15] McDaniels *v.* Colvin, *supra.*

[16] Collins *v.* Carlile, 13 Ill. 254; Ladue *v.* Detroit, etc., R. Co., *supra;* Norwood *v.* Norwood, 36 S. C. 331, 15 S. E. 382, 31 Am. St. Rep. 875.

[17] Spader *v.* Lawler, 17 Ohio 371, 49 Am. Dec. 461.

[18] "Such a mortgage (one to secure future advances) might well be denominated a mortgage *in esse*—without the possibility of issue extinct—as no man can tell what progeny of numerous debts it might subsequently gather under its motherly folds." (Parentheses supplied.) Spader *v.* Lawler, *supra.*

[19] In delivering the opinion of the court, Christiancy, J., said: "The mortgage instrument, without any debt, liability, or obligation

ligation to make the future advances, but where they are optional, the lien will attach only from the date of the advance and not from the date of the mortgage.[20]

These cases deny the existence of a "sleeping mortgage." [21] They contend that the registry statutes were passed in order that the exact status of property with respect to encumbrances might be known at any time; hence a mortgage for indefinite future advances is notice to subsequent lienors only to the extent of the advances already made.[22] By registering the subsequent encumbrance, the junior lienor gives notice to the prior mortgagee, for the latter is under no obligation to make the advances,[23] if he does not think the land then, after the junior mortgage has attached, is sufficient security. Requiring the senior mortgagee to search the records is, according to this view, no great hardship, being only a matter of a few minutes time, since search has to be made for subsequent liens only back to the time of the last advance.[24]

No case can be found in Virginia, in which this question of notice by recordation to a mortgagee in a mortgage to secure future advances has been directly raised. From the state of the authorities, it would seem that the Virginia court had good grounds for its *dictum* that "upon this point the authorities are irreconcilably in conflict." [25] Undoubtedly there are two legitimate views, each strongly supported by numerous precedents. Taken by and large, the doctrine that registration is not sufficient notice to the prior mortgagee appears to be the better of the two. Dean Lile seems to favor this view—that actual notice is required.[26] In a recent case in West Virginia,[27] actual notice was held necessary to postpone the lien of the first mortgagee, but whether the Virginia court would follow this view, if the question should arise, is, of necessity, a matter of grave doubt.

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secured by it, can have no present legal effect as a mortgage or encumbrance upon the land. It is but a shadow without a substance, an incident without a principal; * * *.

"The instrument can only take effect as a mortgage or encumbrance from the time when some debt or liability shall be created, or some binding contract is made, which is to be secured by it. * * * It constitutes of itself no binding contract. Either party may disregard or repudiate it at his pleasure. * * * It is but a kind of conditional proposition, neither binding nor intended to bind either of the parties till subsequently assented to or adopted by both." Ladue *v.* Detroit, etc., R. Co., *supra.*

[20] Nicklin *v.* Nelson, 11 Ore. 406, 5 Pac. 51.

[21] Spade *v.* Lawler, *supra.*

[22] Ketcham *v.* Wood, 22 Hun (N. Y.) 64; Nicklin *v.* Nelson, *supra.*

[23] It will be remembered that only those cases where the advances are optional are now being considered.

[24] Ladue *v.* Detroit, etc., R. Co., *supra.*

[25] Alexandria Savings Inst. *v.* Thomas, *supra.*

[26] LILE, NOTES ON EQUITY JURISPRUDENCE, 161.

[27] Hall *v.* Williamson Grocery Co., *supra.*